CLERK'S COPY.

192

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944 1945

No. 454 3

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED, APPELLANT,

vs.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

FILED MARCH 13, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED, APPELLANT,

vs.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

INDEX.

	Original	Print
Proceedings in Supreme Court of Indiana	1	1
Caption (omitted in printing)	6	
Note re filing of transcript	6	1
Assignment of error	7	1
Record from Circuit Court of Wayne County	8	2
Caption (omitted in printing)	8	
Complaint	8	2
Summons	16	6
Answer	17	7
Minute entry of argument and submission	21	9
Finding and judgment	22	9
Motion for new trial	24	10
Order overruling motion for new trial and granting appeal	24	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1944.

—2567

	Original	Print
Record from Circuit Court of Wayne County—Continued		
Bill of exceptions	26	11
Caption	26	11
Appearances	28	12
Testimony of Byron B. Emswiller	28	12
Exhibit "1"—Letter, dated February 19, 1941, from Gath P. Freeman to Gross Income Tax Division	32	14
Exhibit "2"—Letter, dated February 28, 1941, from Gross Income Tax Division to Gath P. Freeman	36	16
Exhibit "3"—Stipulation of facts	39	17
Reporter's certificate (omitted in printing)	47	
Order settling bill of exceptions	48	22
Praecipe for record	49	22
Clerk's certificate (omitted in printing)	51	
Notices of appeal	52	23
Excerpts from Appellant's brief	57	24
Petition for and order extending time to file appellee's brief (omitted in printing)	64	30
Minute entries of filing appellee's brief and appellant's reply brief	64	30
Opinion, Shake, J.	66	30
Appellee's petition for rehearing	75	36
Petition for oral argument on petition for rehearing	83	39
Order denying petitions for oral argument and rehearing	83	39
Petition for appeal, assignment of errors and prayer for reversal	84	39
Order allowing appeal	89	41
Cost bond (omitted in printing)	92	
Citation (omitted in printing)	99	
Praecipe for record	106	43
Clerk's certificate (omitted in printing)	110	
Statement of points to be relied upon and designation of parts of the record to be printed	111	45
Counter-designation of parts of the record to be printed	113	45
Order noting probable jurisdiction	115	46

[fol. 1-6] [Caption omitted]

IN THE SUPREME COURT OF INDIANA

No. 27881

GILBERT K. HEWIT, Dir. Gross Income Tax Dept. etc.

vs.

GATH P. FREEMAN, Trustee, etc.

Appeal from Wayne Circuit Court

NOTE RE FILING OF TRANSCRIPT—June 17, 1943

Filed June 17, 1943, Thomas C. Williams, Clerk. 1943, June 17, Record, Assignment of Errors, Notices served below. Submitted under Rule 2-14.

[fol. 7] IN THE SUPREME COURT OF INDIANA

[Title omitted]

ASSIGNMENT OF ERROR—Filed June 17, 1943

The appellant says there is manifest error in the Judgment and proceedings in this cause, in the following particular:

1. The trial court erred in overruling appellant's motion for a new trial, which motion contained the following specifications:

"1. The decision of the Court is not sustained by sufficient evidence;

2. The decision of the Court is contrary to law."

Wherefore, the appellant prays that the judgment of the Wayne Circuit Court be reversed.

(Signed) James A. Emmert, The Attorney General; (Signed) David I. Day, Jr., Deputy Attorney General; (Signed) Byron B. Emshwiller, Deputy Attorney General, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 8] [Caption omitted]

IN THE WAYNE CIRCUIT COURT

GATH P. FREEMAN, Trustee under the Will and of the Estate [fol. 9] of Henry C. Starr, Deceased, Plaintiff,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax, Department of Treasury, State of Indiana, Defendant

No. 31071

COMPLAINT TO RECOVER GROSS INCOME TAX IMPROPERLY CHARGED AND COLLECTED, AND INTEREST THEREON—Filed January 27, 1942

Comes now the plaintiff, Gath P. Freeman as Trustee under the will and of the estate of Henry C. Starr, deceased, and complains of the Defendant, Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, of the State of Indiana, and for cause of action alleges and says:

That the Plaintiff, Gath P. Freeman, Trustee aforesaid, was at all times herein mentioned and now is Trustee under the will and of the estate of Henry C. Starr, deceased, late of Wayne County, State of Indiana, and that said Gath P. Freeman was at all times herein mentioned and now is domiciled in and a resident of Wayne Township in Wayne County in the State of Indiana, and that the situs of said trust estate was at all times herein mentioned and now is in said Wayne Township in Wayne County in the State of Indiana, and that all matters and transactions herein alleged or involved or complained of and herein sued upon were matters and transactions of said trust estate and were handled and done and performed by the Plaintiff as such Trustee aforesaid for the use and benefit and as the business of said trust estate, and that the Plaintiff at all times [fol. 10] herein mentioned had and now has full and legal powers and authority in the premises, as such Trustee aforesaid.

That the defendant, Gilbert K. Hewit, Director aforesaid, is Director of Gross Income Tax of the Department of Treasury of the State of Indiana and was duly desig-

nated by the proper official of said State of Indiana as such Director to act as the chief administrative officer charged with the administration and/or enforcement of the Indiana Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto.

That the Plaintiff on the 28th day of January or the 29th day of January, 1941, filed with and in the office of the Gross Income Tax Division of the State of Indiana, as required by law, a Fiduciary Gross Income Tax Return for said trust estate for the period beginning January 1, 1940, and ending December 31, 1940, and paid the total balance of tax indicated thereon in the sum of $760.74. That in and by said Return the Plaintiff reported and returned on line 3 thereof under protest the sum of $65,214.20 constituting and being the amount of gross receipts and total sale prices received by the Plaintiff from the sale of intangible personal property consisting of corporate stocks and bonds of foreign corporations belonging to said trust estate and sold by the Plaintiff in inter-state commerce in the year 1940 to residents of states other than the State of Indiana.

That the sale so made *were* of the following described [fol. 11] property consisting of corporate stocks and the certificates therefor and bonds and for the respective gross sale amounts or gross sale prices set forth and described as follows, to-wit:

50 shares common stock of Allied Chemical & Dye Corporation	$6,897.36
50 shares common stock of American Telephone and Telegraph Company	7,985.83
2265 shares of Corporate Trust Shares Accumulative Modified	4,981.53
100 shares of common stock of Continental Can Company	3,462.88
100 shares of common stock of Continental Can Company	3,552.37
100 shares of common stock of Hollinger Mines, Lts.	585.78
555 shares of North American Trust Shares	1,220.51
200 shares of common stock of National Biscuit Company	3,560.04
200 shares of common stock of National Biscuit Company	3,459.88
277 shares of Quarterly Income Shares, Inc.	1,498.28

100 shares of common stock of Standard Brands, Inc.	521.23
100 shares of common stock of South Porto Rico Sugar Co.	2,048.45
100 shares of common stock of South Porto Rico Sugar Co.	1,876.21
[fol. 12] 100 shares of common stock of F. W. Woolworth Company	3,076.68
200 shares of common stock of F. W. Woolworth Company	5,953.63
$5000 American Furniture Mart Building Bonds 3-6's of 1955	3,784.13
$3000 Buenos Aires Readjustment Bonds, 4⅝ of 1976	1,311.96
$5000 Cairo Bridge and Terminal Co. bonds, 6½'s of 1938	3,934.56
$5000 Commonwealth of Australia 4½% Gold Bonds of 1956	1,768.01
$5000 Western Maryland Railroad Co., 4's of 1952	3,734.88
Total	$65,214.20

That each and all of said sales of said property were made by the Plaintiff through the New York Stock Exchange or in over the counter market in the City of New York in the State of New York to persons who were residents of states other than the State of Indiana, and that upon the sales of said property being effected through such stock exchange or in such over the counter market the Plaintiff herein shipped or mailed by United States mail from the City of Richmond in the State of Indiana the stock certificates and/or the bonds herein above described to the broker representing this Plaintiff in said City of New York for delivery there to the respective purchasers upon the [fol. 13] respective sales so made, and that said stock certificates and said bonds were delivered to such respective purchasers thereof in said State of New York in execution, completion and consummation of the sales so made. That each and all of said sales of said property were transactions in interstate commerce and were and are exempt from the payment of Gross Income Tax to the State of Indiana and that no Gross Income Tax was or is due or payable to the State of Indiana on account of the same by reason of the

fact that all of said transactions constituted and were interstate commerce and the gross receipts of the Plaintiff therefrom were receipts from business conducted in commerce between the State of Indiana and State of New York or other states of the United States, and the Gross Income Tax charged and collected therefor or on account thereof constituted a regulation of and a burden upon commerce between the State of Indiana and other states of the United States in conflict with Article I, Section 8 of the Constitution of the United States, and that the State of Indiana and the defendant herein was and is prohibited from taxing such gross income or receipts under the Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto.

That the Plaintiff made return of said gross income and receipts and paid the Gross Income Tax thereon in the sum of $652.14 on said 28th day of January, 1941, under protest solely to avoid the imposition of penalties and interest thereon, and that the Defendant improperly charged and collected said tax from the Plaintiff, and that the Plaintiff [fol. 14] was and has been improperly required to pay the same.

That at the same time, to-wit: on the 28th day of January 1941, the Plaintiff filed with and in the office of the Gross Income Tax Division of the State of Indiana, as authorized and required by law, a verified petition for refund of said Gross Income Tax so returned and paid and so improperly charged and collected by the Defendant from the Plaintiff, in which there was set forth at length the facts constituting the ground of Plaintiff's protest and objections to the payment of said tax so improperly charged and collected and on which said claim for refund was based and upon which this Plaintiff relies in this action; and that on or about the 28th day of February, 1941, the Defendant notified the Plaintiff in writing that his said verified claim for refund of said tax was disallowed and denied.

That the Defendant has wholly failed and refused to refund to the Plaintiff the said tax so paid under protest and so improperly charged and collected by the Defendant, or any part thereof, and that the Plaintiff has done all things and has taken all steps and action required by law to be done or taken before the filing of this complaint for refund or recovery of said tax, and that there is now justly due the Plaintiff from the defendant the said sum of $652.14 by way

of refund of said tax aforesaid, together with interest thereon allowed by law, and the same is wholly unpaid.

Wherefore, the Plaintiff prays and demands judgment [fol. 15] against the Defendant for said amount of $652.14, together with interest thereon from the date of payment of said tax in said amount, for his costs herein laid out and expended, and for all other proper relief in the premises.

Gath P. Freeman, Attorney for Plaintiff.

Duly sworn to by Gath P. Freeman. Jurat omitted in printing.

[fol. 16] IN THE WAYNE CIRCUIT COURT

SUMMONS—Issued Jan. 27, 1942

STATE OF INDIANA,
Wayne County, ss:

The State of Indiana to the Sheriff of Marion County, Greeting:

You are hereby commanded to summon Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana, (copy of complaint attached hereto) to appear in the Circuit Court of Wayne County, Indiana, before the Judge thereof, on the 24th day of February 1942, at the Court House, in the City of Richmond, to answer the complaint of Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, deceased—Complaint to Recover Gross Income Tax Improperly Charged and Collected and Interest Thereon. Demand $652.14 and Interest, and of this Writ make due return.

Witness my name and the Seal of said Court, at the City of Richmond, this 27th day of January, 1942. Russell Robbins, Clerk. (Seal.)

[fol. 17] IN THE WAYNE CIRCUIT COURT

[Title omitted]

ANSWER—Filed Feb. 21, 1942

Comes now the defendant and for answer to the plaintiff's complaint herein, states;

1. The defendant admits so much of the first literary paragraph of the complaint as alleges that the plaintiff, Gath P. Freeman, Trustee, is and has been a trustee un-
[fol. 18] der the will and of the estate of Henry C. Starr, deceased; that the plaintiff is a resident of and is now domiciled in Wayne County, Indiana; that the situs of the trust estate is Wayne County, Indiana; and that the transactions involved in this action were transactions of said trust estate and were performed by the plaintiff as trustee.

2. The defendant admits all of the allegations of the second literary paragraph of the plaintiff's complaint to-wit:

"That the Defendant, Gilbert K. Hewit, Director aforesaid, is Director of Gross Income Tax of the Department of Treasury of the State of Indiana and was duly designated by the proper official of said State of Indiana as such Director to act as the chief administrative officer charged with the administration and/or enforcement of the Indiana Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto."

3. In answer to the third literary paragraph of plaintiff's complaint, the defendant admits that the plaintiff filed with the Gross Income Tax Division of the State of Indiana a fiduciary return for the calendar year 1940 and that the tax reflected in the amount of $760.74 was paid; the defendant admits that such return reflected a sum of $65,214.20, but this defendant is without knowledge as to the source of such income; and the defendant denies that such income was received from transactions in interstate commerce.

4. In answer to the fourth literary paragraph of plain-
[fol. 19] tiff's complaint, the defendant states that it is without knowledge of the truth or falsity of the allegations that the sales referred to were of corporate stocks and bonds and were sold for the amounts alleged.

5. The defendant is without knowledge of the truth or falsity of the allegations of the plaintiff in his fifth literary paragraph of complaint that the sales referred to were made in stock markets in New York, New York; that such sale- were made to residents of states other than the State of Indiana; that such stocks and bonds were mailed from Richmond, Indiana, to plaintiff's broker in New York, New York; and that such stocks or bonds were delivered to purchasers in New York, New York. The defendant denies that the sales referred to were sales in interstate commerce; that such sales were exempt from Indiana Gross Income Tax; and that the tax collected by the State of Indiana constituted a regulation and burden upon commerce between the State of Indiana and other states of the United States, in conflict with Article I, Section 8 of the Constitution of the United States.

6. The defendant admits the allegation in literary paragraph six of plaintiff's complaint which alleges that a Gross Income Tax Return was filed by plaintiff for the year 1940; that such return was filed under protest; and that a tax in the amount of $652.14 was paid on an item listed on such return in the amount of $65,214.20, but the defendant is without knowledge of the source of such in-[fol. 20] come to plaintiff; further defendant denies that the tax in the amount of $652.14 was improperly charged and collected from plaintiff by defendant.

7. In answer to literary paragraph seven of plaintiff's complaint, the defendant admits that in January, 1941, plaintiff filed with defendant his verified claim for refund, setting forth plaintiff's protest and objections to the collection of tax on certain items of income for the year 1940; and defendant further admits that defendant notified plaintiff that such claim for refund was denied and disallowed.

8. The defendant admits that the refund claimed by plaintiff has been refused by defendant and that no part of the tax paid by plaintiff to defendant for the year 1940 has been refunded by defendant; the defendant further admits that plaintiff has taken all steps required by law precedent to the bringing of this action; but defendant denies that there is any amount due plaintiff by defendant.

9. The defendant, as a further answer to the plaintiff's complaint, says that as to any allegation or averment, or

any part thereof, contained in the said plaintiff's complaint, not either admitted or denied heretofore in this answer, the defendant now specifically denies each and every and all such allegations and averments or parts thereof.

Wherefore, defendant prays that judgment be rendered in its behalf for defendant's costs, and for all other proper relief in the premises.

[fol. 21] George N. Beamer, The Attorney General;
Joseph P. McNamara, Deputy Attorney General;
Byron B. Emswiller, Deputy Attorney General.

IN THE WAYNE CIRCUIT COURT

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Feb. 18, 1943

Come parties, in person and by counsel, and this cause being at issue is submitted to the Court for trial and determination without the intervention of a jury.

Opening statements by counsel, and evidence introduced [fol. 22] by plaintiff and defendant.

And now this cause is now submitted to the Court for finding and judgment, and the plaintiff submits briefs by way of argument, and now this cause is taken under advisement by the Court and defendant is granted twenty days to file its brief herein.

IN THE WAYNE CIRCUIT COURT

GATH P. FREEMAN, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Plaintiff,

v.

GILBERT K. HEWIT, Director of Gross Income Tax, Department of Treasury, State of Indiana, Defendant.

FINDING AND JUDGMENT—March 26, 1943

The Court having examined and read the briefs filed by counsel herein, and having considered the evidence introduced at the trial of this cause and being duly advised in the premises now finds for the plaintiff and against the defendant, and that the allegations of plaintiff's complaint

are true and that the prayer of the complaint should be granted and plaintiff should recover from the defendant the [fol. 23] sum of $652.14 with interest thereon from date of payment of tax, to-wit: January 29th, 1941 and costs herein.

It is therefore considered, adjudged and ordered by the Court that the plaintiff have and recover from the defendant the sum of Six Hundred and Fifty two ($652.14) Dollars and fourteen cents with interest thereon from January 29th, 1941 and costs of this action.

[fol. 24] IN THE WAYNE CIRCUIT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed April 8, 1943

Comes now Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana and moves the Court for a new trial and for grounds therefore states:

1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law.

James A. Emmert, The Attorney General; David I. Day, Jr., Deputy Attorney General; Byron B. Emswiller, Deputy Attorney General, Attorneys for defendants.

IN THE WAYNE CIRCUIT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.—April 8, 1943

The Court having inspected the motion for a new trial [fol. 25] and being duly advised in the premises now overrules the same, and defendant excepts.

Come now the parties in the above entitled cause and the defendant having filed his motion for a new trial on the 8th day of April, 1943, and the same having been overruled on the 8th day of April, 1943, and the defendant having duly excepted at the time, the defendant now prays an appeal to the Supreme Court of Indiana, which prayer is now granted.

Said defendant requests sixty (60) days within which to file all bills of exceptions, and the request is now granted.

Comes now the defendant in the above-entitled cause, and within the time allowed by the Court, presents Bill of Exceptions No. 1, and the same is now signed, sealed and certified by the Judge to be correct and to contain all of the evidence given in this cause, and the same is now ordered to be filed by the Clerk and made a part of the Record, without copying, and the same is now filed by the Clerk and made a part of the Record.

[File endorsements omitted]

IN THE WAYNE CIRCUIT COURT

[Title omitted]

[fol. 26] Before the Honorable Gustave H. Hoelscher, Sole Judge of Said Court

Defendant's Bill of Exceptions Containing All of the Evidence Given in Said Cause—Filed April 8, 1943

Be It Remembered: That heretofore and upon, to-wit, the 18th day of February, 1943, the same being a Judicial Day of the January Term, 1943, of said Court, the above-entitled cause came on for trial before the Honorable Gustave H. Hoelscher, sole judge of the Seventeenth Judicial Circuit Court of Indiana, without the intervention of a jury.

That, at the trial of said cause and before the introduction of any evidence therein, the Court ordered John F. Holaday, the duly appointed and sworn Official Court Reporter of said Court, to take down and note in shorthand all of the evidence given in said cause, including both questions and answers, and to take down and note all rulings of the [fol. 27] judge in respect to the admission and rejection of evidence, and the objections and exceptions of counsel thereto.

That thereupon the said John F. Holaday, Official Court Reporter of said Court, did take down and note, in shorthand, all of the evidence given in said cause, including both questions and answers, and did take down and note all rulings of the judge in respect to the admission and rejection

of evidence, and the objections and exceptions of counsel thereto, under the direction of the judge of said Court, which evidence, rulings of the judge, and objections and exceptions, as aforesaid, so taken down and noted in shorthand by said Official Court Reporter of said Court, together with all documentary evidence and exhibits admitted in evidence, were, by him, afterward, at the request of the defendant, written out in typewritten manuscript, which evidence, including both questions and answers, and rulings of the judge in respect to the admission and rejection of evidence and the objections and exceptions of counsel thereto, together with all documentary evidence, and true copies of all exhibits introduced in evidence, is in the words and figures as follows, to-wit:

[fols. 28-29] APPEARANCES:

Gath P. Freeman, Esq., Richmond, Indiana, for the plaintiff;

Byron B. Emswiller, Esq., Deputy Attorney General of the State of Indiana, Indianapolis, Indiana, for the defendant.

The plaintiff, to support and maintain the allegations of his complaint herein, gave, offered and introduced the following evidence:

Byron B. Emswiller, was called to testify as a witness in behalf of the plaintiff, and, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows on direct examination, on being questioned by Mr. Freeman, attorney for the plaintiff:

[fol. 30] Q. You may state your name to the Court.

A. Byron B. Emswiller.

Q. Have you a position with The State of Indiana?

A. I have.

Q. What is it?

A. I am an attorney for the Gross Income Tax Division.

Q. Are you classed as a deputy Attorney General of The State of Indiana?

A. No, sir.

Q. I thought you were.

A. I was until January 13th.

Q. You are now attorney of record in the trial of this action now before the Court?

A. That is right.

Q. Representing the defendant in this action?

A. Yes, sir.

Q. Are you familiar with the files of this case, and what transpired prior to the filing of the case, so far as shown by letters or correspondence?

A. I am.

Q. Do you have in your possession a letter written by me, signed by me, dated February 19, 1941, in connection with the tax liability of Henry C. Starr Estate, of which I am trustee, addressed to Gross Income Tax Division, Mr. Gilbert K. Hewit, Director, Mr. R. M. Worrell, Audit Section—Estates, 141 South Meridian Street, Indianapolis, Indiana?

[fol. 31] A. I have that letter.

The witness produced a letter and the same is, by request of counsel for the plaintiff, marked by the Official Court Reporter as "Exhibit 1."

Q. I will hand you this letter, which has just been marked "Exhibit 1" by the Court Reporter, and ask you to state whether that is the letter you have just referred to by your last answer.

A. That is the letter, yes, sir.

Q. It appears to be file-marked, with red ink stamp, on the face of that letter. Do you know whose stamp that is?

A. That is the stamp of the Gross Income Tax Division.

Q. Of the State of Indiana?

A. That is right.

Q. You may state whether that letter, marked "Exhibit 1," was received by the addressee, The Gross Income Tax Division, Mr. Gilbert K. Hewit, Director.

A. It was received, yes, sir.

Q. Would you know about when it was received?

A. February 21, 1941.

[fol. 32] Mr. Freeman: The plaintiff offers in evidence the letter which has been marked "Exhibit 1."

Exhibit 1 was admitted in evidence, was read to the Court, and is in words and figures as follows, to-wit:

EXHIBIT 1

Stamped: Received Feb. 21, 1941, Gross Income Tax Store License Div.

GATH P. FREEMAN

Lawyer

Richmond, Indiana

Leland Hotel

February 19, 1941.

Gross Income Tax Division, Mr. Gilbert K. Hewit, Director.
Mr. R. M. Worrell, Audit Section—Estates, 141 South Meridian Street, Indianapolis, Indiana.

GENTLEMEN:

Re: Henry C. Starr Estate, Gath P. Freeman, Trustee

Replying to your letter of the 18th I beg to advise that I am Trustee under the will of Henry C. Starr, deceased, who died in 1923, and that the trust created by the will is a private trust requiring no report to the Court. Therefore, [fol. 33] there are no Court reports reflecting income requested by your letter.

I handle the trust estate as Trustee under the will, collect the income, pay the expenses and make distribution to the three beneficiaries, without reports to or orders of Court.

I understood that the Department had always taken the position that receipts from the sales of intangibles in interstate transactions are subject to the Gross Income Tax. In 1939 I paid tax on receipts from sales of intangibles in interstate commerce, the amount being comparatively small, although it was my opinion that the same was not liable for the tax. However, I have three years from January, 1940, in which to claim refund therefor, as I read the law.

Inasmuch as the tax liability was large for the year 1940, according to the construction of the law by the Department, I decided to claim refund of tax paid on such interstate commerce transactions immediately upon filing the return and paying the tax. In doing so I was actuated in part by the fact that a suit was filed in the Federal Court at Indianapolis last September to test the question of validity of the Gross

Income Tax claimed by the Department on receipts from sales of intangibles in interstate commerce. I understand that this is the first suit raising this issue. However, my tax liability, if any, as such Trustee for the year 1940 on [fol. 34] interstate sales of intangibles is of sufficient magnitude to warrant the testing of the question on account of the estate which I represent as such trustee.

Respectfully, Gath P. Freeman.

GPF: mk.

Counsel produces a letter dated February 28, 1941, purporting to be signed by J. M. Simmons Audit Section—Estates, which is marked, at his request, by the Official Court Reporter as "Exhibit 2."

Q. I hand you what purports to be another letter, which is marked "Exhibit Number 2," bearing date February 28, 1941, addressed to Gath P. Freeman, Lawyer, Leland Hotel, Richmond, Indiana, in connection with the estate of Henry C. Starr, deceased, Gath P. Freeman, Trustee, purporting to be signed by Gilbert K. Hewit, Director Gross Income Tax Division, by J. M. Simmons. I will ask you to state whether that is Mr. Simmons's signature.

A. Yes. That is Mr. Simmons's signature.

Q. Is that a letter that Mr. Gilbert K. Hewit, Director Gross Income Tax Division signed?

A. It was written over his signature, yes, sir.

[fol. 35] Q. Would you say then, it is Mr. Gilbert K. Hewit's letter?

A. No, sir. I wouldn't say it was Mr. Hewit's letter. I would say it was a letter written by one of his employes.

Q. Or one of his assistants?

A. Yes, sir.

Q. Mr. Simmons being an employe of Mr. Hewit, or being an assistant to Mr. Hewit, both employes of The State of Indiana.

A. I think you are right, that he would be an assistant. He and Mr. Hewit are both employes of The State of Indiana.

Q. Do you know whether Mr. Simmons was then authorized to act for Mr. Hewit in the signing of that letter or of similar letters?

A. Yes, sir. He was.

Mr. Freeman: That is all.

Whereupon the witness was excused.

[fol. 36] Mr. Freeman: The plaintiff now offers in evidence Exhibit 2.

The Court: If there is no objection, show the same admitted.

Exhibit 2 was admitted in evidence, was read to the Court, and is in words and figures as follows, to-wit:

EXHIBIT 2

State of Indiana

Gross Income Tax and Store License Division

Department of Treasury

141 South Meridian Street

Indianapolis, Indiana

February 28, 1941

Gilbert K. Hewit, Director.

Board: Henry F. Schricker, Governor; James M. Givens, Treasurer; Richard T. James, Auditor.

Gath P. Freeman, Lawyer, Leland Hotel, Richmond, Indiana.

DEAR SIR:

Re: Est. of Henry C. Starr, Dec.
Gath P. Freeman, Trustee

This will acknowledge receipt of your letter of February 19.

[fol. 37] This Department has always taken the position that the income from the sale of intangibles is not subject to regulations concerning sales made in interstate commerce and that only tangible property will be subject to these provisions.

May we refer you to the case of the Department of Treasury vs. J. D. Adams & Company.

Trusting this is the desired information, I am,

Very truly yours, Gilbert K. Hewit, Director, Gross Income Tax Division, by J. M. Simmons, Audit Section—Estates."

jsm/mo.

Mr. Freeman: If the Court please, we have a statement of facts in this case, signed by both parties.

Counsel produces a written statement of facts which is, at his request, marked by the Official Court Reporter as "Exhibit 3."

Mr. Freeman: The parties have an agreed statement of facts, which has been marked "Exhibit 3," which I now offer in evidence.

The Court: If there is no objection, the same may be [fol. 38] shown admitted in evidence.

Exhibit 3 was admitted in evidence, read to the Court, and is in words and figures as follows, to-wit:

[Title omitted]

[fol. 39]

EXHIBIT 3

STIPULATION OF FACTS—Filed April 8, 1943

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the facts hereinafter set forth shall be considered as facts proved under the issues in this cause, with the same force and effect as though established by competent evidence introduced at the trial, namely:

1. The plaintiff, Gath P. Freeman, is and was at all times mentioned herein, the trustee under the Will and of the Estate of Henry C. Starr, deceased, late of Wayne County, State of Indiana, and Gath P. Freeman was at all times herein mentioned and now is domiciled in and a resident of Wayne Township in Wayne County, State of Indiana, and all matters and transactions herein involved were matters and transactions of said trust estate and were handled and performed by the said trustee for the use and benefit [fol. 40] and as the business of the trust estate, and that Gath P. Freeman at all times herein mentioned had and now has full and legal power and authority to act as such trustee. Further, that neither Gath P. Freeman, nor the Estate of Henry C. Starr, nor Gath P. Freeman, as trustee, had or has a place of business at any point other than at Richmond, Wayne County in the State of Indiana. That the plaintiff is hereinafter referred to as the trustee.

2. The defendant, Gilbert K. Hewit, is the Director of the Gross Income Tax Division, Department of Treasury of the State of Indiana, and was duly designated by the Governor of said State of Indiana as such Director, and as the Chief Administrative officer charged with the administration and enforcement of the Indiana Gross Income Tax Act of 1933, and the acts amendatory thereof and supplemental thereto.

3. In January, 1941, the trustee filed a fiduciary gross income tax return for the trust estate mentioned above for the period beginning January 1, 1940, and ending December 31, 1940, and paid the total amount of tax reflected on such return. In said return the trustee included as taxable income an item of $65,214.20, constituting the gross receipts received by the trustee from the sale of intangible personal property consisting of corporate stocks and bonds of foreign corporations belonging to the said trust estate. The trustee paid gross income tax on such receipts in the [fol. 41] amount of $652.14, under protest.

4. The sales made by the trustee were of the following described property consisting of corporate stocks and bonds and are set forth and described as follows, to-wit:

50 shares common stock of Allied Chemical & Dye Corporation	$ 6,897.36
50 shares Common stock of American Telephone & Telegraph Company	7,985.83
2,265 shares of Corporate Trust Shares accumulative Modified	4,981.53
100 shares of common stock of Continental Can Co.	3,462.88
100 shares of Common stock of Continental Can Co.	3,552.37
100 shares of common stock of Hollinger Mines, Ltd.	585.78
555 shares of North American Trust shares	1,220.51
200 shares of common stock of National Biscuit Co.	3,560.04
200 shares of common stock of National Biscuit Co.	3,459.88
277 shares of Quarterly Income Shares, Inc.	1,498.28
100 shares of common stock of Standard Brands, Inc.	521.23

100 shares of common stock of South Porto Rico Sugar Company	2,048.45
100 shares of common stock of South Porto [fol. 42] Rico Sugar Company	1,876.21
100 shares of common stock of F. W. Woolworth Co.	3,076.68
200 shares of common stock of F. W. Woolworth Co.	5,953.63
$5,000 American Furniture Mart Building Bonds 3-6's of 1955	3,784.13
$3,000 Buenos Aires Readjustment Bonds, 4⅝ of 1976	1,311.96
$5,000 Cairo Bridge & Terminal Co. Bonds, 6½'s of 1938	3,934.56
$5,000 Commonwealth of Australia 4½ Gold Bonds of 1956	1,768.01
$5,000 Western Maryland Railroad Co., 4's of 1952	3,734.88
Total	$65,214.20

5. The sales of the above described corporate stocks and bonds were twenty separate sales made from time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service [fol. 43] over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished

the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner [fol. 44] and Beane offered the stocks or bonds according to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana, over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana, the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown

[fol. 45] nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as a broker to procure sales thereof on or for commissions. All of said sales were handled in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana.

6. Subsequent to the payment of tax in controversy in [fol. 46] the amount of $652.14, the plaintiff filed a claim for refund for such amount with the defendant. The defendant denied in full such claim for refund.

7. All steps necessarily precedent to the institution of this action, have been taken by plaintiff and defendant.

8. Either party to this suit may introduce additional evidence at the time of the trial of this cause.

Gath P. Freeman, Attorney for Plaintiff. George N. Beamer, David I. Day, Jr., Byron B. Emswiller, Attorneys for Defendants."

[File endorsement omitted.]

[fol. 47] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 48] IN THE WAYNE CIRCUIT COURT

ORDER APPROVING BILL OF EXCEPTIONS—April 8, 1943

STATE OF INDIANA,
County of Wayne, ss:

I, Gustave H. Hoelscher, sole judge of the Wayne Circuit Court, which County of Wayne comprises the 17th Judicial Circuit of the State of Indiana, do hereby certify that the above and foregoing Bill of Exceptions contains all of the evidence given upon the trial of the above-entitled and numbered cause, of Gath P. Freeman, Trustee under the will and of the estate of Henry C. Starr, deceased, against Gilbert K. Hewit, Director of State Income Tax, Department of Treasury, State of Indiana, together with all objections of counsel, rulings of the Court thereon, and exceptions reserved to such rulings, taken upon the trial of said cause.

I further certify that on the 8th day of April, 1943, the defendant presented said Bill of Exceptions to me for my approval; and, having examined said Bill, I now approve and sign and seal the same and make it a part of the record in said cause.

In Witness Whereof, I have hereunto set my hand and the Seal of the Wayne Circuit Court, at the court house in the City of Richmond, Indiana, on this 8th day of April, 1943.

(Signed) Gustave H. Hoelscher, Judge, Wayne Circuit Court.

[fol. 49] IN THE WAYNE CIRCUIT COURT

[Title omitted]

PRAECIPE FOR RECORD—Filed April 8, 1943.

To the Clerk of the Wayne Circuit Court:

You are hereby requested by the defendant in the above entitled cause to prepare and properly certify for use on appeal to the Supreme Court of Indiana, a transcript of the entire record in the above entitled cause, said transcript to include all papers and records, orders, rulings, exceptions and proceedings made, taken, filed, and had in the [fol. 50] above entitled cause, including, but not in limitation thereof, the following:

First, the summons, complaint and answer. Second, the finding, judgment and decree of the Court. Third,

the defendant's "Motion for a New Trial" and the ruling thereon. Fourth, the defendant's prayer for an appeal and the ruling thereon. Fifth, incorporating therein the transcript of the evidence. Sixth, all pleadings, papers, orders, rulings and exceptions made and taken in said cause and the judgment rendered thereon. Seventh, this Praecipe and all other proper papers, records, orders, rulings and exceptions.

Gilbert K. Hewit, Director of Gross Income Tax; Department of Treasury, State of Indiana. James A. Emmert, the Attorney General. David I. Day, Jr., Deputy Attorney General. Byron B. Emswiller, Deputy Attorney General.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] IN THE WAYNE CIRCUIT COURT

[Title omitted]

NOTICE TO CLERK—Filed April 8, 1943

To the Clerk of the Wayne Circuit Court:

You are hereby notified that the defendant in the above entitled cause will appeal to the Supreme Court of Indiana from the judgment rendered against the said defendant by the Wayne Circuit Court in the above entitled cause on 26th day of March, 1943.

Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana. (Signed) James A. Emmert, the Attorney General. [fol. 53] David I. Day, Jr., Deputy Attorney General. Byron B. Emswiller, Deputy Attorney General, Attorneys for Defendant.

Receipt of the foregoing notice is hereby acknowledge by me this 8th day of April, 1943.

(Signed) Kendal E. Mathews, Clerk of the Wayne Circuit Court.

[File endorsement omitted.]

[fol. 54] IN THE WAYNE CIRCUIT COURT

[Title omitted]

NOTICE TO PLAINTIFF

To Gath P. Freeman, Attorney for Plaintiff, Richmond, Indiana. Gath P. Freeman, Trustee, under the Will and of the Estate of Henry C. Starr, deceased:

You are hereby notified that the defendant in the above entitled cause will appeal to the Supreme Court of Indiana from the judgment rendered against the said defendant by the Wayne Circuit Court in the above entitled cause on March 26, 1943.

Gilbert K. Hewit, Director of Gross Income Tax, Department of Treasury, State of Indiana. [fols. 55-56] (Signed) James A. Emmert, the Attorney General. David I. Day, Jr., Deputy Attorney General. Byron B. Emswiller, Deputy Attorney General. Attorneys for Defendant.

Receipt of the foregoing notice is hereby acknowledged by me this 10th day of April, 1943.

(Signed) Gath P. Freeman, Attorney for Plaintiff.

[fol. 57] IN SUPREME COURT OF INDIANA

* * * * * * * *

EXCERPTS FROM APPELLANT'S BRIEF—Filed July 1, 1943

"Page 2

II

"What the Issues Were

"The issues were formed by the filing of an Answer in Denial (Record, p. 10, l.16, to Record, p. 14, l.15) to plaintiff's Complaint (Record p. 2, l.24, to Record p. 8, l.30). The contentions of the parties were briefly as follows:

"The appellee contended that the amounts received by him and covered by the evidence constituted gross income derived from business conducted in commerce between the

State of Indiana and other States of the United States to such an extent that the State of Indiana is prohibited from taxing such income by Section 8, Article I of the Constitution of the United States of America.

"The appellant contended that the transactions reflected by the evidence did not constitute that type of commerce which the State of Indiana is prohibited from taxing under the provisions of the Commerce Clause of the Federal Constitution."

(and also

"Page 23.

"Propositions, Points and Authorities.

"I

[fol. 57a]

"Indiana, Being the Domicile of the Seller is Privileged to Tax

"This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

"'1. The trial court erred in overruling appellant's Motion for a New Trial, which motion contained the following specifications:

"1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law' ". Record, p. 1.

"Point 1

"The taxpayer is domiciled within Indiana and therefore Indiana has the power, and does impose an income tax upon him regardless of the source of the income."

"Record p. 31:
Sec. 2, Chap. 117, Acts of 1937;
[fol. 58] Maguire v. Trefry (1919), 253 U. S. 12;
Lawrence v. State Tax Commission (1931), 286 U. S. 276;
Sec. 1(m), Chap. 117, Acts of 1937.

"Point 2

"The tax in question is an excise levied upon those domiciled within the state and is not an intangibles tax, or a tax

on the certificates or evidences of indebtedness. Appellee is domiciled here.

Miles v. Department of Treasury (1935), 209 Ind. 172, 199 N. E. 372.

"Point 3

"Stock certificates and bonds are documents which are evidences of the number of shares of stock which the holder of them owns or the amount of money due a lender and do not in themselves constitute choses of action or property.

Edwards v. Wabash Ry. Co. (1920), 264 F. 610, 613.

"Point 4

"The burden of establishing a right to a claimed exemption is upon the one who claims it.

Orr v. Baker (1853), 4 Ind. 86;

2 Cooley on Taxation (4th Ed.) (1924), Sec. 672, p. 1407;

Henderson Bridge Co. v. Henderson (1899), 173 U. S. 592.

"Proposition II

"The Rule of Mobilia Sequuntur Personam is Applicable Here

[fol. 59] "This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

" '1. The trial court erred in overruling appellant's motion for a New Trial, which motion contained the following specifications:

1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law.' "

Record, p. 1.

"Point 1

"The rule of "mobilia sequuntur personam" merely means that the situs of personal property for purposes of taxation is the domicile of the owner unless there is a statute to the contrary or—in case of intangible property, it has acquired a business situs in a state other than the one where

the owner is domiciled. Neither appellee nor the intangibles involved here acquired any situs outside Indiana.

Cooley, Taxation (4th Ed.), sec. 440.

"Point 2

"The Supreme Court has said:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard [fol. 60] to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not."

Blodgett, Tax Comm. of State of Connecticut v. Silberman, et al. (1928), 277 U. S. 1.

"During all of appellee's transactions, therefore, the situs of his stocks and bonds was in Indiana."

"Point 3

"And that Court has also said:

"Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicile of the creditor and within the jurisdiction of the state where he has such domocile. It is property within that state. Thus it has been held that a debt owed by a citizen of one state against a citizen of another state and evidenced by the bond of the debtor secured by a deed of trust or mortgage upon real estate situated in the state where the debtor resides, is property taxed by the state of the residence of the creditor, if the statute of that state so provides, and such tax violates no provision of the Federal Constitution.

Kirtland v. Hotchkiss, 100 U. S. 491."

Buck v. Beach (1906), 206 U. S. 392."

"Point 4

[fol. 61] "In this class of cases the tendency of modern authorities is to apply the maxim 'mobilia sequuntur personam' and to hold that the property may be taxed at the domicile of the owner as the real situs of the debt. Obviously, if the property itself can be taxed receipts from the sale thereof may be taxed by the state in which it is located.

Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194."

"Point 5

"Intangible property is so associated with the person of its owner at his domicile that the taxing jurisdiction of his domicile always has the right and power to tax.

Curry, State Tax Comm. of Alabama, et al. v McCanless, Comm. of Finance and Taxation of Tennessee (1939), 307 U. S. 357;

Graves et al. v. Eliott et al. (1939), 307 U. S. 383;

See also: Guaranty Trust Co. v. Virginia (1938), 305 U. S. 19;

New York ex rel Cohn v. Graves (1937), 300 U. S. 308."

"Proposition III

"The Prohibition of the Commerce Clause on Taxing Income from Tangible Property Does Not Apply to the Tax on Income When Intangibles Are Involved.

"This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

[fol. 62] "'1. The trial court erred in overruling appellant's Motion for a New Trial, which motion contained the following specifications:

"1. The decision of the Court is not sustained by sufficient evidence.

2. The decision of the Court is contrary to law.'" Record, p. 1."

"Point 1

"The vice of a tax measured by gross receipts (such as the Indiana Gross Income Tax) on tangible property

levied by the jurisdiction from which the goods are shipped is that there is a possibility that the same type tax could be levied by other jurisdictions and thus tangible merchandise in interstate commerce might be subjected to a multiple tax burden not borne by local commerce.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307."

"Point 2

"The Supreme Court of the United States has very recently held that a tax on gross receipts from tangible property can be levied constitutionally by the buyer's state because by this method interstate commerce thus could pay no more tax than local commerce.

Allied Mills, Inc. v. Department of Treasury (1943), 63 S. Ct. 666, Affirming ——Ind. ——, 42 N. E. (2d) 34:

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33;

[fol. 63] Sears, Roebuck and Co. v. McGoldrick (1938), 18 N. E. (2d) 25."

"Point 3

"Intangible property can be the subject or measure of a tax in as many jurisdictions as give privileges or benefits to the owner of the intangible property. Appellee being domiciled in Indiana, the imposition of this tax is valid, there being no constitutional objection thereto.

State Tax. Comm. of Utah v. Aldrich et al. (1942), 316 U. S. 174;

Curry, State Tax Commissioner of Alabama, et al. v. McCanless, Commissioner of Finance and Taxation of Tennessee (1939), 307 U. S. 357;

Graves et al. v. Eliott, et al., 307 U. S. 283 (1939);

O'Kane v. State (1940), 28 N. E. (2d) 905."

* * * * * * *

(page 37 and 38 of Appellant's Brief, as follows:)

* * * * * * *

"No constitutional objection can be successfully made against the taxation of the resident trustee involved here, measured by the gross receipts from his sales of intangibles —his sales of rights, the legal situs of which follow his per-

son like the re-idence of an infant child follows that of his parents. An intangible right is incapable of shipment in interstate commerce, therefore the *Adams* case and other cases of the same type involving shipments of corporeal objects in the channels of interstate trade can have no practical application here."

[fol. 64] IN SUPREME COURT OF INDIANA

MINUTE ENTRIES OF FILING APPELLEE'S BRIEF AND APPELLANT'S REPLY BRIEF

And Afterwards, to-wit: On the 29th day of September, 1943, the same being a judicial day of the May Term of the Supreme Court, the following proceedings were had, to-wit:

Comes now the appellee by counsel and files herein his brief (9) and proof of service upon counsel, which brief is in the words and figures following, to-wit: (H. I.).

[fol. 65] And Afterward to-wit: On the 14th day of October, 1943, the same being a judicial day of the May Term of the Supreme Court, the following proceedings were had, to-wit:

Comes now the appellant by counsel and files herein a Reply Brief, (9) together with affidavit of mailing, which brief is in the words and figures following, to-wit: (H. I.)

[fol. 66] IN THE SUPREME COURT OF INDIANA

No. 27881

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, Appellant,

vs.

GATH P. FREEMAN, Trustee under the will and of the Estate of Henry C. Starr, Deceased, Appellee

Appeal from Wayne Circuit Court

OPINION—Oct. 25, 1943

Comes now the parties by counsel and the court, being advised in the premises, reverses the judgment of the court below with the following opinion pronounced by Shake, J.

During 1940 the appellee, who was domiciled in Indiana, paid, under protest, Indiana Gross Income taxes calculated on proceeds derived from the sale of corporate stocks and bonds of foreign corporations. Subsequently, the appellee brought this action and recovered the amount of taxes so paid. The State has appealed from the overruling of its motion for a new trial, which asserted that the decision was contrary to law.

The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation:

"5. The sales of the above described corporate stocks [fol. 67] and bonds were twenty separate sales made from time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to [fol. 68] said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not

a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds according to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana, the stock certificates or bonds so sold, who mailed the [fol. 69] same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States Mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the

certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest [fol. 70] in any of said sales or property except as a broker to procure sales thereof on or for commissions. All of said sales were handled in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana."

The question presented by this appeal is whether the appellee is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933. § 64-2601 et seq., Burns' 1933, § 15981 et seq., Baldwin's 1934. Section 6 of that act exempts "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the [fol. 71] United Staees."

Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather

a protection against such commerce being subjected to the onerous burdens of multiple exactions. "The validity of State regulation under the commerce clause is to be determined by the balancing of two considerations: that State government shall be able to derive revenue for its support, and that commerce among the States shall be unfettered by provincial impediments. Stated conversely, interstate commerce must bear its share of the tax burden along with intrastate commerce, but the states may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay.

O'Kane v. *State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905.

Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By [fol. 72] adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected.

Dept. of the Treasury v. *Allied Mills, Inc.* (1942), —Ind.—, 42 N. E. (2d) 34.

affirmed by the United States Supreme Court February 15, 1943, —U. S., 87 L. Ed. —, 63 Sup. Ct. 666.

J. D. Adams Mfg. Co. v. *Storen* (1938), 58 Sup. Ct. 913, 304 U. S. 307.

The situs of intangible property, such as stocks and bonds, is not of a transitory character. As to assets of this type there has been applied the rule of "mobilia sequuntur personam"—the situs of the property is the domicile of the owner. This doctrine maintains, generally, in the absence of a statute or of peculiar facts forcing a different conclusion. Cooley, Taxation (4th Ed.) §440.

Union Refrigerator Transit Co. v. *Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36.

Buck v. *Beach* (1906), 206 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732.

Blodgett, Tax Commissioner of the State of Conn. v. *Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410.

Croop v. Walton (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386.

[fol. 73] No such statute has been called to our attention and no such facts are disclosed by the stipulation. It must, therefore, be concluded that the situs of the stocks and bonds sold by the appellee was in this state, where he was domiciled. For a discussion of the circumstances that may establish for intangible property a situs different from the domicile of the owner see

Miami Coal Co. v. *Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333.

The appellee concedes that the law is as stated above, but he relies upon the proposition that the sale of said securities, in the manner described by the stipulation, constituted transactions in interstate commerce. He leans upon the circumstances that the offers of sale, the acceptance of the offers, the delivery of the certificates evidencing ownership, and the remittance of the proceeds by the broker in New York to him in Richmond, Indiana, were effectuated by the facilities of interstate commerce. Having admitted the major premise, the appellee's contention must fail. If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers. The activities of the appellee's agents in making the sales did not change the situs of his securities any more than they affected his domicile. That said activities incidently involved interstate commerce is immaterial.

Holland Furnace Co. v. Dept. of Treasury (1943), [fol. 74] —C. C. A.—, 133 F. (2d) 212.

The stipulated facts disclose a sufficient basis for imposing upon the appellee a tax measured by the gross income derived from the sales therein described. Whether the appellee's incidental activities in another jurisdiction might subject him to additional tax liabilities there is not before us; but even that contingency would not relieve him from the obligation he now seeks to avoid.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162.

O'Kane v. *State*, supra.

The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant.

[fol. 74a] [File endorsement omitted]

[fol. 75] IN SUPREME COURT OF INDIANA

[Title omitted]

APPELLEE'S PETITION FOR REHEARING—Filed Nov. 13, 1943

Gath P. Freeman, Trustee under the will and of the estate of Henry C. Starr, deceased, Appellee in the above-entitled cause, respectfully petitions the Court to grant a rehearing in said cause for the reason that the Court erred in its opinion, decision and judgment rendered October 25, 1943, in the following respects, to-wit:

1. The Court erred in holding that the Gross Income Tax Act of 1933 applies to and validly levies a tax upon the gross income or receipts of Appellee derived from [fol. 76] business conducted in commerce between the State of Indiana and other states of the United States, or between the Appellee, a resident of Indiana, and residents of other states of the United States, since and inasmuch as said Act (a) by the clear wording of its provisions was not intended to apply to gross income or receipts from such commerce, and (b) if so applied and construed would contravene and be repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States, and would be an undue burden on interstate commerce in contravention of said constitutional provisions.

2. The Court erred in holding that the Gross Income Tax Act of 1933 is not repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States, as applied to gross income or receipts of Appellee derived from commerce among the several states of the United States, or between the Appellee, a resident of Indiana, and residents of other states of the United States, and that said Act is valid and applicable to the gross income or receipts of Appellee derived from such commerce.

3. The Court erred in holding that the need of a local or state government for revenue for its support is to be considered in determining the validity of a state tax which directly burdens interstate commerce.

4. The Court erred in holding that interstate commerce [fol. 77] must bear a share of state tax burden even though

the state tax directly burdens interstate commerce in violation of Article I, Section 8, or is violative of Article I, Section 10, of the Constitution of the United States.

5. The Court erred in holding that the intangibles, the corporate stocks and bonds, of the Appellee sold and delivered by him as alleged and described in his complaint in said cause and as proved by the evidence in said cause, were not subjects of commerce, and that the Appellee's sales thereof to residents of other states of the United States did not constitute commerce between or among the several states of the United States within the meaning of Article I, Section 8 of the Constitution of the United States.

6. The Court erred in holding that the sales made by the Appellee were not sales in interstate commerce because or for the reason, as the Court held, that the situs of the securities sold was at the place of Appellee's domicile in Indiana until the ownership passed to the purchasers in New York.

7. The Court erred in holding that the activities of Appellee's agents or brokers in making the sales were not the activities of the Appellee as principal, and that such activities did not change the situs of the securities so sold, the stipulated facts showing that the securities sold were de-
[fol. 78] livered in New York according to the intention of the Appellee and the purchasers and according to the rules of the New York Stock Exchange, upon payment of the purchase price, when and where the situs changed by virtue of such activities from the Appellee's domicile in Indiana to the respective places of domicile of the purchasers in other states of the United States.

8. The Court erred in failing to hold that the stipulated facts in evidence disclosed and proved sales by Appellee of his stocks and bonds from Richmond, Indiana, through the New York Stock Exchange to purchasers resident of other states of the United States; the deliveries of which under the rules of said New York Stock Exchange and according to the intention and acts of the Appellee and the purchasers were in New York, where the titles of the securities passed and the situs changed upon such deliveries from the Appellee in Indiana to the purchasers in other states, and that all such sales were sales in interstate commerce

and that the Gross Income Tax Act of Indiana was not applicable to any of such sales.

9. The Court erred in holding that the stipulated facts failed to disclose and prove that the sales of securities by Appellee were sales in interstate commerce not subject to the tax imposed by the Gross Income Tax Act of Indiana.

10. The Court erred in failing to hold that the stipulated [fol. 79] facts disclosed and proved that the sales of securities by Appellee were sales in interstate commerce protected by the commerce clause of the Constitution of the United States and not subject to or liable for the tax imposed by the Gross Income Tax Act of Indiana.

11. The Court erred in holding that the stipulated facts disclosed a sufficient basis for imposing upon the Appellee a tax measured by the gross income derived from the sales therein described, the stipulated facts showing and disclosing that the sales were transactions in interstate commerce, the receipts or gross income of which, realized or received as the sales prices, were not subject to the provisions of the Gross Income Tax Act of Indiana, the imposition and collection of which tax contravened and was repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States, and was an undue burden on interstate commerce in contravention of said constitutional provisions.

Respectfully submitted, (Signed) Gath P. Freeman, Attorney for Appellee.

[fol. 80] [File endorsement omitted]

[fol. 81] In the Supreme Court of Indiana

[Title omitted]

Proof or Service of Copies of Appellee's Petition for Rehearing and Brief Thereon

Receipt is hereby acknowledged this 13th day of November, 1943, of two printed copies of Appellee's Petition for Rehearing and Brief Thereon in the above entitled cause; also separate copy of Petition for Rehearing.

(Signed) James A. Emmert, The Attorney General of Indiana.

[fol. 82] [File endorsement omitted]

[fol. 83] IN SUPREME COURT OF INDIANA

PETITION FOR ORAL ARGUMENT ON PETITION FOR REHEARING—November 13, 1943

Comes now the appellee by counsel and files his petition for oral argument on petition for rehearing, which petition is in the words and figures following, to-wit: (H. I.).

IN SUPREME COURT OF INDIANA

. . . . . .

ORDER DENYING PETITIONS FOR ORAL ARGUMENT AND REHEARING—November 22, 1943

Comes now the parties by counsel and the court being advised in the premises denies appellee's petition heretofore filed herein for an oral argument on petition for rehearing.

And the court being further advised in the premises, denies the petition of appellee heretofore filed herein for a rehearing.

[fol. 84] IN SUPREME COURT OF INDIANA

[Title omitted]

Petition for Appeal

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed February 17, 1944

To the Chief Justice of the Supreme Court of the State of Indiana:

PETITION FOR APPEAL

The petitioner, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, respectfully shows that he is the appellee in the above entitled cause; that the Supreme Court of Indiana rendered a final decision in said cause on the 22nd day of November, 1943; that said Supreme Court is the highest court of said State in which a decision in this suit can be had; that in said cause

[fol. 85] there is drawn in question the validity of a statute of the State of Indiana on the ground that said statute is repugnant to the Constitution and laws of the United States, and the said decision is in favor of its validity; and that the petitioner considers himself and the said trust estate aggrieved by said final decision.

Wherefore, the petitioner prays that an appeal be allowed from the Supreme Court of Indiana to the Supreme Court of the United States and that the appeal bond herewith tendered by the petitioner be approved.

ASSIGNMENT OF ERRORS

The petitioner, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, appellee in the above entitled cause and as appellant on appeal to the Supreme Court of the United States from the final decision and judgment heretofore entered herein by the Supreme Court of Indiana, assigns as error the following:

1. The Supreme Court of Indiana erred

a. in holding that the Gross Income Tax Act of 1933 (Ch. 50, Indiana Acts 1933; Burns Indiana Statutes Annotated 1933, Sec. 64-2601 et seq.) is valid as applied to gross receipts of appellant derived from sales of his corporate stocks and bonds conducted in interstate commerce, and that the tax imposed by said Act on such gross receipts is not invalid as constituting an [fol. 86] illegal burden on such commerce in conflict with Article I, Section 8 of the Constitution of the United States:

b. in refusing to hold that said Act when applied to gross receipts of appellant derived from such commerce among the several states is repugnant to Article I, Section 8 of the Constitution of the United States as imposing an illegal burden upon such commerce;

c. in holding that the intangibles, the corporate stocks and bonds, of the appellant sold and delivered by him as alleged and described in his complaint and in the stipulation of facts in said cause, were not subjects of commerce, and that the appellant's sales thereof to residents of other states of the United States did not constitute commerce between or among the sev-

eral states within the meaning of Article I, Section 8 of the Constitution of the United States;

d. in refusing to hold that the sales and deliveries of the intangibles, the corporate stocks and bonds, by the appellant to residents of other states, as alleged and described in his complaint and in the stipulation [fol. 87] of facts in said cause, constituted commerce among the several states protected by the commerce clause, Article I, Section 8 of the Constitution of the United States, against the tax imposed by said Gross Income Tax Act of Indiana; and

e. in reversing the judgment of the trial court and holding that said Act is valid and authorizes and requires the assessment and collection of the tax upon the gross receipts of appellant derived from such business conducted in interstate commerce.

PRAYER FOR REVERSAL

For which errors the said Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, as appellant on said appeal, prays that the said judgment of the Supreme Court of Indiana finally rendered on November 22, 1943, in the above entitled cause be reversed and a judgment ordered in favor of appellant and for costs.

Dated this 17th day of February, 1944.

(Signed) Gath P. Freeman, Attorney for Appellant.

[fol. 88] [File endorsement omitted.]

[fol. 89] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER ALLOWING APPEAL—Feb. 17, 1944

The petition of Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, appellee in the above-entitled cause, for an appeal in said cause to the Supreme Court of the United States from the judgment of the Supreme Court of Indiana, having heretofore been filed with the Clerk of this Court and presented herein and accompanied by assignment of errors, prayer for reversal of

the judgment, an appeal bond and a statement as to jurisdiction, all as provided by the statutes and the rules of the Supreme Court of the United States, and the record in this cause having been considered and the decision therein [fol. 90] to be appealed from constituting a final judgment of the highest court in the State in which a decision in said suit can be had, and it appearing that in this cause there is drawn in question the validity of a statute of the State of Indiana on the ground that it is repugnant to the Constitution of the United States, and said decision being in favor of the validity of such statute;

It Is Therefore Ordered that an appeal be and hereby is allowed to the Supreme Court of the United States as prayed for in said petition, and the Clerk of the Supreme Court of Indiana is hereby ordered and directed within forty days from this date to make and transmit to the Clerk of the Supreme Court of the United States under his hand and the seal of this Court a true, full and complete copy of all material parts of the record herein which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with the applicable statutes and the rules of the Supreme Court of the United States.

It Is Further Ordered that the cost bond of petitioner, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, as appellant in said appeal, in the sum of One Thousand Dollars ($1,000.00), with Hartford Accident and Indemnity Company as surety thereon, is a good and sufficient bond that said appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make his plea good in the Supreme Court of the United States, and the same is hereby approved.

[fol. 91] Dated this 17 day of February, 1944.

(Signed) Michael L. Fansler, Chief Justice of the Supreme Court of Indiana.

[File endorsement omitted.]

[fols. 92-98] Cost Bond on Apepal for $1000.00 approved and filed Feb. 17, 1944 omitted in printing.

[fols. 99-105] Citation in usual form showing service on James A. Emmert and Gilbert K. Hewit omitted in printing.

[fol. 106] IN THE SUPREME COURT OF INDIANA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed February 17, 1944

To the Hon. Thomas C. Williams, Clerk of the Supreme Court of Indiana:

Please include the following papers, pleadings, proceedings, parts and actions in the transcript of the record in the above entitled cause to be transmitted to the Supreme Court of the United States pursuant to the allowance of appeal thereto in said cause, and also please indicate as to all papers filed in your office the date of the filing of the same, as follows:

[fol. 107] 1. The transcript of record filed in your office which shows inter se:

(a) Plaintiff's complaint;
(b) Summons;
(c) Return of summons;
(d) Appearance;
(e) Answer of Defendant;
(f) Finding of Court;
(g) Judgment of Court;
(h) Defendant's motion for new trial;
(i) Motion for new trial overruled;
(j) Appeal granted;
(k) Praecipe for transcript;
(l) Bill of Exceptions; Plaintiff's Exhibit No. 1, Plaintiff's Exhibit No. 2, and Plaintiff's Exhibit No. 3, Stipulation of Facts.
(m) Certificate of Court Reporter;
(n) Certificate of Judge;
(o) Certificate of Clerk;
(p) Assignment of Errors.

2. The following parts or portions of appellant's printed brief in the Supreme Court of Indiana, specifying the points to be relied upon for reversal, appearing under the heading "Propositions, Points and Authorities", and including particularly the heading and all that part of said brief following, beginning at the top of page 23 of said brief and

[fol. 108] including all that part and pages thereof following to and including all of page 28 thereof.

3. Decision and order reversing judgment of trial court, and the opinion of Shake, J., for the Supreme Court of Indiana in said cause, rendered October 25, 1943.

4. The appellee's petition for rehearing.

5. The order of November 22, 1943, denying the petition for rehearing.

6. Petition for appeal to the Supreme Court of the United States, assignment of errors and prayer for reversal.

7. Order allowing said appeal and approving cost bond.

8. Cost bond and approval thereof.

9. Citation and proof of service thereof.

10. Proof of service of appeal papers.

11. This praecipe for transcript.

12. Any stipulation or orders settling the record.

13. Your certificate as to the record.

14. Statement as to jurisdiction of the Supreme Court of the United States filed with said petition for appeal, said statement to be separately certified to.

15. Also (to follow the parts of appellant's brief specified in specification 2 above) the following parts or portions of appellant's brief in the Supreme Court of Indiana: All [fol. 109] that appears on page 2 thereof under the heading "II—What the Issues Were", including the heading; and the last paragraph, or part of paragraph, at the bottom of page 37 of appellant's brief, which continues on page 38 thereof, and all that appears on page 38 of said brief.

(Signed) Gath P. Freeman, Attorney for Appellee, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, deceased.

Service and receipt of a copy of the above praecipe for transcript of record is acknowledged this 17th day of February, 1944.

(Signed) James A. Emmert, Attorney General of Indiana, Attorney for Appellant.

[fol. 109A] [File endorsement omitted]

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S STATEMENT OF POINTS ON WHICH HE INTENDS TO RELY AND DESIGNATION OF THE PARTS OF THE RECORD DEEMED NECESSARY FOR THE CONSIDERATION THEREOF AND TO BE PRINTED—Filed March 22, 1944.

Comes now Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased, the Appellant on appeal to the Supreme Court of the United States in said cause, and adopts his assignment of errors in the appeal herein as his statement of the points on which he intends to rely in said appeal, and designates and represents that the whole of the record as filed is necessary for the consideration thereof and that the whole of said record [fol. 112] should be printed for use in said appeal, Except the following parts thereof:

Line 1, page 28, to line 4, page 36, inclusive, being Exhibit 1 and testimony identifying the same;
Line 16, page 37, to line 1, page 38, inclusive, being testimony identifying Exhibit 2;
Lines 19, 20 and 21, page 46, being the recital as to all the evidence;
Lines 1 to 16, inclusive, page 64, being entry concerning petition for extention of time to file brief.

Dated this 16th day of March, 1944.
Gath P. Freeman, Attorney for Appellant.

[fol. 113] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

[Title omitted]

APPELLEE'S COUNTER-DESIGNATION OF MATERIAL PARTS OF THE RECORD—Filed April 4, 1944.

Comes now Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, and designates and represents that the parts of the record hereinafter described are believed by him to be material

to a consideration of the above cause in addition to the parts of the record designated by the appellant, to-wit:

1. Exhibit 1 and the testimony identifying the same, appearing in the typewritten transcript filed in this cause at Line 1, Page 28 to Line 4, Page 36 inclusive;

2. The testimony identifying Exhibit 2 appearing in the transcript filed in this cause at Line 16, Page 37 to Line 1, Page 38 inclusive.

[fol. 114] Dated this 24th day of March, 1944.

James A. Emmert, Attorney General of Indiana. John J. McShane, Winslow Van Horne, Deputies Attorney General of Indiana, Attorneys for Appellee.

[fol. 115] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—April 3, 1944

The statement of jurisdiction in this case having been submitted and considered by the court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on cover: File No. 48,281, Indiana, Supreme Court. Term No. 40, Gath P. Freeman, Trustee under the will and of the Estate of Henry C. Starr, Deceased, Appellant, *vs.* Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana. Filed March 13, 1944. Term No. 40 O. T. 1944.